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IN THE

Supreme Court of the United States

October Term 1968

No. [redacted] 187

M. RUDOLPH PREUSS, Trustee in Bankruptcy of CROSBY TELETRONICS CORP.,

Petitioner,

vs.

GENERAL ELECTRIC CO., INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
Citations to Opinions Below	1
Jurisdiction	2
Questions Presented	2
Question 1	2
Question 2	2
Statutes and Rules Involved	3
Statement of the Facts	4
Introduction	4
The Crosby Patent	4
Reasons for Granting the Writ	7
Question 1	7
(a) The Significance of This Question	7
(b) The Legal Problem Posed	9
Question 2	13
(a) Petitioner's Main Argument Concerning Question 2	13
(b) An Example of the Dangers of Retrying the Case on Appeal	16
Conclusion	18

PAGE

APPENDIX 1a

Opinion of the United States Court of Appeals for the Second Circuit, Filed March 14, 1968 1a

Judgment, Entered March 14, 1968 ..... 15a

Opinion of the United States District Court for the Eastern District of New York, Filed May 3, 1967 ..... 16a

Findings and Conclusions of the United States District Court for the Eastern District of New York, Filed June 6, 1967 ..... 23a

---

Table of Authorities

Graham v. *John Deere Co.*, 383 U. S. 1 (1966) ..2, 8, 9, 10, 13

Graver Tank & Mfg. Co. v. *Linde Air Products Co.*, 339 U. S. 605 (1950) 16

Mahaffy and Harder Co. v. *Standard Packaging Corp.*, 389 F. 2d 525 (1968) 14

United States v. *Adams*, 383 U. S. 39 (1966) 2

Statutes

Title 35, U. S. C. §103 ..... 2, 3

Fed. R. Civ. P. 52(a) 3, 16

U. S. Const. Art 1, §8 7

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on March 14, 1968.

Citations to Opinions Below

The opinion of the Court of Appeals is reported at — F. 2d —, 157 U. S. P. Q. 177 (2d Cir., 1968) and is reprinted in the Appendix hereto (pp. 1a-14a). The opinion of the District Court is reported at 269 F. Supp. 993, 154 U. S. P. Q. 152 (E. D. N. Y., 1967) and the Findings

of Fact of the District Court are reported at 154 U. S. P. Q. 152, 155; the opinion and findings being printed in the Appendix hereto (pp. 16a-52a).

Jurisdiction

The Judgment of the Court of Appeals was entered March 14, 1968 (Appendix, pp. 15a-16a). The jurisdiction of this Court is invoked under 28 U. S. C. §1254 (1).

Questions Presented

Question 1:

Is the standard of nonobviousness under 35 U. S. C. §103 applied by the Court of Appeals in conflict with that set forth by this Court in *Graham* v. *John Deere Co.*, 383 U. S. 1 (1966) and *United States* v. *Adams*, 383 U. S. 39 (1966).

(a) In particular, has the Court of Appeals below erroneously treated the issue of "'the level of ordinary skill in the background art'' as a secondary criteria of nonobviousness rather than as one of the primary criteria of nonobviousness?

(b) In further particularity, has the Court of Appeals below, by virtue of its standard, eliminated a primary criteria which serves the useful function of discriminating between the more socially useful inventions and those novelties whose success money can buy?

Question 2:

Did the Court of Appeals in its reversal of the District Court exceed the proper bounds of appellate review and improperly usurp the fact finding function of the trial court by retrying the case and denying petitioner his right to a trial on the facts?

Statutes and Rules Involved

Section 103 of the 1952 Patent Act, 35 U. S. C. §103 (1964) states:

> "Conditions for patentability; non-obvious subject matter.
>
> A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made."

Rule 52(a) of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 52(a) states:

> "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the

findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41 (b).

Statement of the Facts

1. Introduction

Petitioner brought suit under 35 U. S. C. §§271, 281 in the Eastern District of New York against Respondent charging Respondent with infringement of United States Letters Patent No. 2,851,532 (hereinafter "Crosby patent"). Normally issues of infringement and validity are tried in patent cases. However, Respondent General Electric waived all defenses of non-infringement and thus only issues relating to validity were tried.

On this validity issue alone, extensive pre-trial briefs were filed and seventeen (17) days of trial time was had resulting in a 2,423 page transcript. Almost all of the trial time was taken up with the testimonies of experts and the inventor. After the filing of further extensive post trial briefs, the trial judge rendered an opinion in favor of Petitioners, holding the Crosby patent valid. Subsequently, proposed Findings of Fact and Conclusions of Law were submitted by Petitioner. Respondent objected to Petitioner's proposed Findings but chose not to submit its own Findings or Conclusions. The Trial Court adopted Petitioner's proposals.

Respondent appealed to the Second Circuit and its appeal was upheld, the Second Circuit finding the Crosby patent invalid.

2. The Crosby Patent

The Crosby patent in suit covers a basic advance in the radio art which has profoundly influenced the development

of the radio art in that it made feasible commercial stereophonic broadcasting and created a new and important industry within the radio industry. This patent discloses and covers a novel combination of elements to provide a combination of performance characteristics which are a pronounced improvement over anything previously known (Appendix, p. 33a).

The Crosby patent covers a system for broadcasting and receiving information in a stereophonic manner by frequency modulation (FM) of the radio carrier. The system provides the listening public with a program comparable in realism to what would be heard if present at the point of origin listening to the program "live" (Appendix, p. 26a).

The inventor, Murray G. Crosby, has achieved unquestioned stature as a radio engineer (R. 255-9).* He has been involved with technical aspects of the electronic communications field since 1925 (R. 255). For 24 years (1929-1953) prior to making the invention covered by this patent, he actively specialized in experimentation in the FM communication field (R. 255-256). In this art he has authored 17 or 18 technical articles and has had nearly 200 patents issued in his name (R. 256, 254-5).

In recognition of his contributions to the field of FM radio and on the recommendation of the Institute of Electrical and Electronic Engineers, the annual Mervin J. Kelly Award was conferred on him in 1966, with the following citation: "For his pioneering work in the circuit technology, propagation characteristics and noise suppression theory of frequency and phase modulation" (R. 258-9).

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* Pages in the Record are referred to herein with the designation R. However, that portion of the Record which is reproduced in the printed appendix attached hereto is referenced to the appropriate appendix page. Petitioner-Plaintiff's exhibits and Respondent-Defendant's exhibits are referred to as PX and DX, respectively.

As late as April, 1966, Mr. Crosby appeared on a radio panel with, among others, Mr. Kassens—Assistant Chief of Broadcasting Facilities of the Federal Communications Commission—and during a discussion of the history of stero broadcasting, the moderator asked Mr. Kassens whether he had any historical data and he responded in part: "Only to compliment Murray Crosby. I think he did an amazing amount of work to get this thing down the right track" (R. 1820).

Mr. Crosby's invention was widely discussed in the industry after he made it known in 1953. A large portion of the radio industry accorded immediate recognition to his proposal as a significant advance and his house became a mecca for top technical people in this field. Between the years 1954 and 1959, he gave at least 50 demonstrations of his system to industry people most of whom were engineers or otherwise technically qualified (R. 337-349, R. 2164-5).

Because of the nature of the industry and the requirements for FCC approval before any new broadcast system could be adopted, much time elapsed and had to elapse before the practice of his invention received formal legal sanction. However, long before the formal legal recognition, his proposal received wide acclaim from men skilled in this art. As early as June 16, 1953, he presented a paper on his invention at the American Institute of Electrical Engineer's mid-summer convention in Atlantic City, New Jersey, at which time Major Armstrong (the inventor of FM) was one of the discussants of his paper (R. 314-5). Subsequently, Mr. Crosby was invited to present many papers and addresses throughout the United States and Canada up to the time his patent issued and still more papers were presented through the year 1961 (R. 336-7, R. 2164-5). Most of these addresses and papers were presented on invitation to various chapters of the Audio

Engineering Society and Institute of Radio Engineers (IRE) (R. 336-7).

The defendant, General Electric, did not initiate its efforts in FM stero until 1957. As a part of its program the defendant, in the persons of Messrs. Meyer, Beaubein, Dean and Mahuron, among others at General Electric, actively sought information about Mr. Crosby's invention and obtained a copy of the patent in suit (R. 1952-4, 2082-3, PX-31, PX-32, DX-S).

This industry-wide interest and recognition was reflected in more than a willingness to spend both money and valuable engineering time in studying his proposal and viewing his demonstrations. Thirty (30) separate companies took licenses from Mr. Crosby for operation under his patent (R. 133-4, PX-8).

Reasons for Granting the Writ

Question 1:

(a) The Significance of This Question.

The heart of the first question raised by Petitioner is a matter basic to the ability of our patent laws ". . . to promote the progress of science and useful arts"* and thus foster the establishment and growth of new enterprises based on new ideas.

Petitioner believes that what may seem to be a technical question, concerning whether or not a particular criteria is of primary or secondary importance in evaluating non-obviousness, in fact raises a major issue concerning the function and impact of the patent laws.

The patent laws when properly applied provide protection for the individual and the small corporation that is

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* U. S. Const. Art. I, §8.

required if they are to develop and grow with the product involved. Although it is true that this protection is equally available to corporations of all sizes, the large corporation with its access to financial and research resources has the ability to create and develop a market whether or not patents are available to bolster its position. But it is patent protection that makes the crucial difference to small organizations, such as Crosby Laboratories. It is patent protection that makes it possible for these small organizations to develop and grow in the face of the massive resources of the larger competitors. The limited monopoly of the patent is a *de facto* partial offset to a competitor's financial resources.

If this function of the patent laws is to be carried out, then the criteria of nonobviousness must focus on those primary matters which most accurately reflect inventive achievement and less on those secondary criteria which to some extent money can buy. Thus there is an understandable reluctance to allow such secondary criteria as commercial success or popular acclaim to become the touchstones of nonobviousness. After all, commercial success for any novel idea can be bought with enough promotion and advertising.

By contrast, acclaim and interest by those skilled in the art cannot be bought with money and is not automatically accorded to the large and dominant companies in a field. Such acclaim and interest is directly relevant to that primary criteria, "the level of ordinary skill in the background art", set forth in the *Graham* case, *supra*, p. . It is those skilled in the art who can best judge what novelties are nonobvious. To make that judgment of the same significance as the above mentioned secondary criteria is to distort what Petitioner believes to be the tests laid down in the *Graham* case. And in distorting that test,

Petitioner believes that the Second Circuit has undercut one of the major functions of the patent laws, namely to provide that umbrella of protection for the individual inventor and for the small company without which they would be hard put to develop and grow with the product involved.

The wisdom of the distinctions between the "secondary considerations" and the "basic factual inquiries" set forth in the *Graham* case, *supra,* is the difference between considerations that money and power can usually buy or arrange to create and those considerations which are most likely to reflect the legitimate merits of the case.

(b) The Legal Problem Posed.

The Second Circuit's criticism of the trial judge appears to be that the trial judge placed more emphasis on so-called secondary considerations than on primary considerations. The Second Circuit however has treated as secondary considerations not only such matters as commercial success, failure of others, and long felt but unsolved needs (all of which are concededly secondary considerations) but also those inquiries the trial judge made into the level of ordinary skill in the pertinent art. In particular, the after-the-discovery acclaim, which the trial judge emphasized and which the Second Circuit felt he relied upon too heavily (Appendix, pp. 6a-7a), is a factual matter directly related to the determination of that primary consideration, the level of the skill in the art at the time the invention was made.

It was not a Popular Science acclaim on which the trial judge focused but rather the acclaim of those most highly skilled in this art. It was the inventor of FM, Major Armstrong, who was one of the discussants of the paper which Mr. Crosby presented at the American Institute of

Electrical Engineers convention in Atlantic City during the summer of 1953. It was not some radio dealers organization or convention which invited Murray Crosby to speak to them concerning his invention but rather some twenty chapters of the Audio Engineering Society and of the Institute of Radio Engineers (R. 336-7, 2164-5). These engineers do not invite speakers to tout a commercial proposition. They expect to learn something of novel technical merit and when they do, the word gets around and the speech or paper (as it is sometimes called) is repeated. That is exactly what happened to Murray Crosby and to down play that into either a secondary consideration or to criticize the trial judge who brought out the significance of this consideration, is to distort the meaning of the *Graham* case, to fail to follow the standards set forth in the *Graham* case and to result in a complete retrying of the matter that was fully tried before the trial judge. These technical papers and talks, demonstrations and further technical papers and talks extended over a period from 1953 to at least 1961. Surely this indication of sustained engineering interest bespeaks technical merit rather than mere commercial interest.

A review of the trial judge's opinion will show that approximately one third of his opinion was devoted to a consideration of those factors which are relevant in determining the level of ordinary skill in the pertinent art (see, in particular Appendix, pp. 17a-19a). In connection with this portion of the trial judge's opinion, the trial judge did not refer to acclaim by those who were not technically skilled but rather he recited specific evidence of acclaim by members of the American Institute of Electrical Engineers, the Institute of Radio Engineers, the Audio Engineering Society and engineering and technical personnel from such companies as Sylvania, RCA and the

defendant General Electric. The trial judge then went on to say, most cautiously and most properly:

> "These invitations from experts and the demonstrations are *some* evidence that Mr. Crosby had produced a system, not then obvious to them" (emphasis supplied) (Appendix, p. 19a).

The Second Circuit dealt with the trial judge's detailed consideration of this primary consideration of nonobviousness by stating (see Appendix, p. 13a):

> "Admittedly, there was considerable professional excitement over Crosby's invention. The radio industry acclaimed his discovery. But this was because he was the first to make the addition he did, not because his invention was nonobvious at the time. Moreover, for every speech and audience there must be a speaker. And in this case, part of the enthusiasm was generated by the inventor."

This is a most strange response to the trial judge's detailed listing of the relevant considerations. As the Second Circuit concedes, the excitement was "professional excitement" and the acclaim was by the "radio industry". These are not fools to be taken in by a smooth pitch time after time after time over an eight year period.

The fact that for every speech and audience there must be a speaker does not belie the fact that the speaker must be invited and the audience must attend and that if the audience is composed of technical experts that certainly is, in the words of the trial judge, "*some* evidence" that the speaker has something worthwhile and important to say to them.

It is a further strange comment to point out that part of this enthusiasm was generated by the inventor. One would hope so. But absent evidence of quick wit and

overwhelming charisma, one must assume that this enthusiasm was based on the inventor's invention. It seems further strange to make this comment in the context of a known history of acclaimed inventors, such as Major Armstrong, Thomas Edison and Alexander Graham Bell. These inventors also sought to generate enthusiasm for their inventions. Their ultimate success in generating enthusiasm is some evidence of the inventive merit of their products.

To turn to another secondary consideration, that of the failure of others to fulfill the need and come up with this invention, it should be noted that Mr. Crosby and Crosby Laboratories was an extremely minor factor, indeed a negligible economic factor, in the FM industry. This is not a case where a large research organization has simply come around to turning its attention to a problem which no one has bothered to consider previously. The FM industry was in the doldrums and a breakthrough was needed. The dominant research figures in the FM field Major Armstrong recognized this and was working on various proposals such as an expansion of subsidiary communication bands within an allocated band width. RCA had a major research staff which dealt with the problems of new developments in FM. WQXR, and other stations, experimented with a combination of AM and FM stereo broadcasting. But it was Murray Crosby and Crosby Laboratories which came forward with the breakthrough invention and established a new industry, FM stereo. Although he himself was a significant name in this technology, he did what all others had failed to do and most importantly what all the major corporations in this field had failed to do.

The patent law can be the means whereby a man who makes a technological breakthrough because he thinks

independently can also make an economic breakthrough to economic independence. But this cannot be achieved without the protection of the patent laws and the support of the Courts.

Question 2:

(a) Petitioner's Main Argument Concerning Question 2.

As this Court has recently stated in *Graham* v. *John Deere Co.*, 383 U. S. 1, 17-18 (1966):

> "While the ultimate question of patent validity is one of law, . . . the §103 condition, which is but one of three conditions, each of which must be satisfied, lends itself to several basic *factual inquiries.* Under §103, the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the background art resolved. Against this background, the obviousness or nonobviousness of the subject matter as determined (emphasis supplied).

Accordingly, as this Court has set down, the basic determination of nonobviousness requires a series of primary "factual inquiries".

These questions of fact are best determined by the trier of the facts, in this case the District Court. It is the trier of the facts who has the benefit of a full trial before him, an opportunity to hear the witnesses, their testimony and cross examination, and who is in the best position to determine credibility. He can best make the primary factual findings set forth in the *Graham* case, *supra.*

The Fourth Circuit has recognized that these determinations relating to statutory obviousness are questions

of fact and that the Court of Appeals can reverse the District Judge's findings concerning obviousness only if the Appeals Court is convinced that these findings were clearly erroneous; see *Mahaffy and Harder Co.* v. *Standard Packaging Corp.*, 389 F. 2d 525, 530 (4 Cir., 1968).

But the Second Circuit has taken a different tack. In the instant case, the Second Circuit has retried the case and has determined the factual issues all over again. In doing so, the Second Circuit in effect denied the Petitioner his right to the benefit of a full and complete trial of those issues which constitute matters of factual inquiry.

The opinion of the Second Circuit fails to indicate wherein the District Court applied the wrong rule of law. Indeed, the opinion itself is evidence that the Second Circuit has retried the case for in its opinion the Second Circuit states:

> "We reverse on the ground that Crosby's invention would have been obvious at the time of invention to a person of ordinary skill in the radio art" (Appendix, p. 1a).

But the Second Circuit stated:

> "The trial judge found the invention nonobvious" (Appendix, p. 6a).

Otherwise, on this crucial issue as to whether or not the trial judge applied the correct rule of law, the Second Circuit is silent except perhaps where it states:

> "The trial judge placed great emphasis on the secondary supporting issues. He did not focus on the inventive process *so much as* the after-the-discovery results and occurrences" (Appendix, p. 6a) (emphasis supplied).

This critique of the District Court is in no sense a determination that the trier of the facts clearly erred. It does not state he failed to focus on the inventive process much less that he failed to make the primary inquiry necessary in a determination of nonobviousness. Rather, the criticism appears to be that it did not focus on the inventive process "so much as" it did on certain after-the-discovery results and occurrences. That appears to be the gist of the Second Circuit's criticism of the trial court.

Thus, Petitioner finds nothing in the opinion of the Second Circuit which faults the trial judge's determination on an issue of law. The Second Circuit opinion does not even go so far as to say that the trial judge considered any inappropriate issues. On the contrary, the Second Circuit states:

> "Although the issues the trial judge relied on may be appropriate for consideration, . . . they are not to carry too heavy a burden" (Appendix, p. 7a).

Petitioner has gone to the trouble of preparing a comprehensive trial on matters of complex technology and thereby has educated the trial court as to the technological background necessary for an assessment of the invention and of the prior art presented. Petitioner feels that he has been denied due process of law when an Appellate Court then, without the benefit of having sat through a trial, has completely re-examined the factual issues in the case, and, without finding that the trial court has committed any error of law nor having found that the trial court's finding of obviousness was clearly erroneous, reverses the trial court's determination and comes to an entirely different factual determination.

As this Court has stated in *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.* (1950), 339 U. S. 605, 609-10:

> "Like any other issue of fact, final determination requires a balancing of credibility, persuasiveness and weight of evidence. It is to be decided by the trial court and that court's decision, under general principles of appellate review, should not be disturbed unless clearly erroneous. Particularly is this so in a field where so much depends upon familiarity with specific scientific problems and principles not usually contained in the general storehouse of knowledge and experience."

Rule 52 explicitly provides that findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness. The record discloses that the findings of the District Court on the principal issue in the case, nonobviousness, was based on substantial and credible evidence, the bulk of it being the testimony of experts and of the inventor. But the Second Circuit has failed to abide by the requirements of Rule 52 whether one considers the formal Findings of Fact or those factual findings contained in the District Court's opinion.

(b) An Example of the Dangers of Retrying the Case on Appeal.

A very important and crucial factual error has crept into the Second Circuit opinion which is a direct consequence of the fact that the Second Circuit did not have the benefit of a full trial and the education that this can provide the trier of the fact of complex technological matters.

Throughout the Second Circuit opinion, the issue of what is required to obtain full audio frequency separa-

tion in stero reception is misunderstood. This, "full separation over the full audio range" was concededly a very important matter. However, the Second Circuit states:

> "Crosby's claims of full separation over the entire audio range and a balanced signal/noise ratio, both collateral results, should not be allowed to distract us from the principal aspect of the problem which Crosby was trying to solve—how to achieve compatibility. All agreed that if he solved the problem in the FM field, and if full and equal signal were broadcast over both channels, which would have been probable if there were no FCC restrictions, as in AM, then it was mathematically obvious that there would be full separation over the entire audio range" (Appendix, pp. 7a-8a).

This complex statement completely distorts the problem and contains a key factual error. In fact, the solution of the problem of compatibility does *not* as a collateral result provide full separation over the entire audio range. The Second Circuit's statement is thus in error on an important technical fact.

Compatibility simply requires that a sum signal be transmitted. Petitioner concedes, for this purpose, that it would have been obvious to transmit this sum signal over its full audio range. However, that left completely up in the air the question of whether or not the difference signal had to be transmitted over its full audio range. Indeed, Murray Crosby felt initially that the difference signal could be transmitted over less than its full frequency range. Perhaps more significantly, General Electric, even after Murray Crosby's teachings, thought that a less than full frequency difference signal could be transmitted and devoted an extensive series of experiments to determine the necessity for transmitting the difference

signal over its full frequency range (PX-40). It was not at all clear or obvious that the full stereo effect required full separation over the full audio range and thus it was not obvious that the full audio range of the difference signal had to be transmitted (R. 1936-1951, 2413-4). Murray Crosby provided and taught full frequency separation and even if his emphasis in his patent on this arose only after he realized that the prior art prevented him from seeking something broader, nonetheless this was a very real and meaningful contribution which he made.

Unfortunately, this issue is a complex issue. Some exposure to the technology involved is required in order to adequately understand it and certainly to adequately appreciate it in view of the prior art. Unfortunately, the Second Circuit could not have the opportunity that the trial judge had for such exposure. Accordingly, Petitioner believes that this factual error in the Second Circuit's opinion highlights the significance of the Second Circuit's error in retrying the case.

CONCLUSION

Petitioner respectfully requests that this petition for a writ of certiorari be granted.

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